Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

TANA WOOD, ALAN WALTER, GARY EDWARDS, JULIUS VAN SKIKE, WAYNE HELGESON, TERRENCE LAWSON, RICH ALT,

Petitioners,

v.

NORMAN GOTCHER, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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A. Respondent's Release From Prison Underscores The Importance of Review.

In opposing the Petition, Respondent argues that *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995) does not present an important jurisdictional issue because he has been released. Respondent's Brief, at 5. Petitioner offers this reply. Respondent's release from prison has done nothing to mitigate the published *Gotcher* decision, which remains binding precedent for all district courts in the Ninth Circuit.[1]

Also, Respondent's release underscores the importance of the jurisdictional question presented. Respondent filed a civil rights action in which he claimed that "his **loss of good conduct time credits** and placement in disciplinary segregation constituted **compensable violations** of his due process rights", and sought unspecified injunctive relief. App. A-5; *Gotcher*, 66 F.3d at 1098. (Emphasis supplied). By focusing solely on the label of the pro se pleading, the Ninth Circuit failed to construe Respondent's challenge to lost good-time credits as a habeas corpus action. Under this analysis, Respondent has forever lost his ability to seek the earlier release from prison that his claims, if meritorious, would unquestionably have provided. Review of this case is important because *Gotcher* establishes a rule under which unsophisticated pro se litigants who logically desire an earlier release from confinement, will instead languish in civil rights actions because they were unable to explicitly specify a demand for early release.[2] *See* Schwartz, *The Preiser Puzzle:*

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[1]Although Petitioner has confirmed that Respondent has been released, this fact is not reflected in the record of the district court or the Ninth Circuit. It is not clear why Respondent has waited until this late hour to bring his release to the attention of a federal court.

[2]Washington provided Respondent with a clear expedited remedy for his challenge to his loss of good-time credits. Washington Rules of Appellate Procedure 16.9 and 16.11. Not only has Respondent lost this remedy, but the State is exposed to liability because its courts were not given any opportunity

Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners, 37 DePaul L. Rev. 125-26 (1988). The obvious injustice of *Gotcher*'s jurisdictional rule warrants review.

Finally, Respondent incorrectly assumes that his release has no affect on his ability to seek monetary damages for lost good-time credits. This Court undermined this assumption in *Heck v. Humphrey*, 412 U. S. ___, 114 S. Ct. 2364 (1994). Under *Heck*, the Respondent's release precludes his now three-year old challenge to the 1992 disciplinary proceedings and sanction because he failed to exhaust the habeas remedies that were available to him after he received his disciplinary infraction. 114 S. Ct. at 2374 n.10 ("We think the principle barring collateral attacks – a longstanding and deeply rooted feature of both the common law and our own jurisprudence – is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated."). Here, if the Respondent's interpretation of *Heck* in this case is correct, Gotcher's claim is barred. *Id.* at 2374 ("[A] § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.") (emphasis supplied).

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to expedite Respondent's release based upon the errors alleged in his "civil rights" lawsuit. See Petition, at 14, 16.

B. *Heck v. Humphrey* Neither Resolved Nor Addressed the Conflict and Confusion Stemming From *Wolff* and *Preiser*.

Respondent argues that "*Heck* clarified the meaning of *Wolff* very recently and the Petition shows no split of federal authority on it since *Heck* was decided." Respondent's brief at 6, citing *Wolff v. McDonnell*, 418 U.S. 539 (1974). However, *Heck* does not provide such clarification.[3]

Heck has provided a test for cases where, as in *Heck*, the civil rights claim will "necessarily" invalidate a criminal conviction. *Id.* at 2372. Because there was no question that Heck's challenge would have necessarily invalidated the fact of his confinement, the Court was able to resolve the claim based upon principles of tort law. The Court had no need to address the principles of federal-state comity that lie at the heart of *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and the exhaustion requirement itself. *See Williams v. Hill*, 74 F.3d 1339, 1340 (D.C. Cir. 1996); *Offet v. Solem*, 823 F.2d 1256, 1259 (8th Cir. 1987).

Thus, *Heck* did not provide a simple test for cases, such as this one, that are likely to call a prisoner's loss of good-time credits into question. Unless review is granted, the federal courts will continue to struggle where the prisoner labels his complaint as a civil rights challenge to procedures, even though he directly challenges the result of the disciplinary hearing.

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[3]According to Respondent, *Heck* has clarified *Wolff v. McDonnell*, 418 U.S. 539 (1974), to allow him or any prisoner to circumvent habeas requirements by challenging the procedures of a specific disciplinary hearing, even though the Respondent also challenges the results of the disciplinary hearing through a prayer for damages and injunctive relief. Respondent's brief, at 6. In an unpublished decision, the Seventh Circuit explicitly recognized that there was "a debate" as to "whether (or how) *Heck* might apply in prison disciplinary cases." *Gibbons v. Higgins*, 1995 WL 761743 (7th Cir. 1995) (unpublished) (Posner, J., writing for the three-judge panel).

The Eighth Circuit concisely described the unique problem as follows:

> The distinction adopted by some other federal courts between a challenge to the "manner" of applying prison disciplinary sanctions and one challenging the "outcome" of a particular proceeding seems to us **no answer to the concerns of federalism that cases such as this one raise.**

Offet, at 1259 (emphasis supplied); *see also Serio v. Members of Louisiana State Board of Pardons*, 821 F.2d 1112, 1116 (5th Cir. 1987); *Clark v. Thompson*, 960 F.2d 663, 664 (7th Cir. 1992). Because Heck directly and necessarily challenged the outcome of his criminal trial, his case provides "no answer to the concerns of federalism" that cases such as Respondent's raise. *See Offet*, 823 F.2d at 1259.

Respondent's assertion that *Heck* has clarified the application of *Wolff* is further refuted by cases decided since *Heck*. *Miller v. Indiana Dept. Of Corrections*, 75 F.3d 330, 331 (7th Cir. 1996); *Broussard v. Johnson*, ___F. Supp. ___, 1996 WL 115450, at 2 (E.D. Tex. 1996), *citing Serio*; *Richmond v. Duke*, 909 F. Supp. 626 (E.D. Ark. 1995). *See also Gibbons v. Higgins*, 1995 WL 761743 (7th Cir. 1995) (unpublished); *Cochrell v. Purkett*, 1996 WL 78179 (8th Cir. 1996) (unpublished); *Williams v. Godinez*, 1996 WL 124463 (N.D.Ill. 1996) (unpublished).

In *Miller*, an Indiana inmate brought a civil rights suit for damages, claiming that he was denied a classification that would have entitled him to good-time credits. Straining to avoid a conflict with *Gotcher* and *Armento-Bey v. Harper*, 68 F.3d 215 (8th Cir. 1995), the court incorrectly presumed that these civil rights claims went forward because the inmates "conceded that

the correctional system had reached the right result".[4] *Miller*, 75 F.3d at 331. Because Miller did not concede that his procedural challenge was harmless, his case was properly dismissed. *Id.* Here, the Ninth Circuit explicitly recognized Respondent's claim that the loss of good-time credits was itself a "compensable violation[]" of his due process rights. *Gotcher*, at 1098. If Respondent were in the Seventh Circuit, he would "not be able to use a suit for damages to get around the procedures that have been established for challenging the lawfulness of continued confinement." *Miller*, 75 F.3d at 331.

Similarly, in *Richmond*, the court noted the "basic dichotomy of *Heck*" between challenges that necessarily invalidate confinement, and challenges to procedures that are only allowed to proceed if they "would not be sufficient to undermine" the confinement. *Richmond*, 909 F.Supp. at 629. The court found it "difficult (though not impossible) to reconcile the decision in *Armento-Bey* with the dichotomy inherent in the *Heck* decision." *Id.* at n.8. The only way the court could achieve this reconciliation was by incorrectly assuming, like the Seventh Circuit in *Miller*, that Armento-Bey conceded that the procedural violation was harmless error. *Id.* Because it was "arguable" that Richmond's disciplinary sanction could not be allowed to stand, the court dismissed the claim. *Id.* at 633.

In *Williams v. Godinez*, the court reviewed a claim where the "plaintiff (sought) damages and injunctive relief that (did) not include restoration of good time". *Williams*, 1996 WL 124463, at 1. Despite this narrow request for relief, the court dismissed the case because "it is evident that any favorable ruling

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[4]The Seventh Circuit's attempt to distinguish these cases was unsuccessful because in *Gotcher* the inmate specifically claimed that "his loss of good conduct time credits . . . constituted compensable violations of his due process rights." App. A-5; *Gotcher*, 66 F.3d at 1098. Further, like Respondent, Armento-Bey never conceded that the loss of good-time credits was proper; he continued to claim damages for loss of good-time credits. *Armento-Bey*, 68 F.3d at 216.

would by implication entitle plaintiff to return of the good-time credits taken from him as a result of the disciplinary hearings." *Id.*

In *Cochrell*, the inmate alleged that he was unconstitutionally denied parole based upon his race. For relief, Cochrell merely sought a declaration that the Defendants' actions were unconstitutional, and to "enjoin (defendants') illegal and unconstitutional practices". *Cochrell*, 1996 WL 78179, at 1. The Eighth Circuit affirmed the district court because "the essence of Cochrell's claim was that his parole has been unconstitutionally delayed, and that he was attacking the duration of his confinement and seeking an immediate or speedier release." *Id.*

The foregoing decisions directly contradict Respondent's assertion that *Heck* has clarified the application of *Wolff* to prison disciplinary cases such as the one now before this Court. Until this issue is resolved, federal courts will continue to reach conflicting decisions on the jurisdictional question presented by prisoners who challenge such procedures.

C. The Existence of State-Created Liberty Depends on the Nature of the Interest Allegedly Created, Not the Presence of the Word "Serious" in a State Regulation.

The Petition addressed why the Ninth Circuit constitutionalized Washington's prison disciplinary system without determining whether loss of good-time credits imposes an "atypical and significant hardship". *See Sandin v. Conner*, ___ U.S. ___, 115 S. Ct. 2293, 2300 (1995). This sanction is not atypical; Petitioner demonstrated that prison officials may impose this sanction in response to a broad range of misconduct. Petition, at 22-23, and n. 11.

In response, Respondent urges this Court to ignore the range of misconduct sanctionable with a loss of good-time credits, arguing that such a review is irrelevant to the question of state-created liberty. According to Respondent, the Ninth Circuit has correctly identified *Wolff v. McDonnell*, 418 U.S. 539 (1974) as a case under which states will automatically create a liberty interest whenever the word "serious" is used to distinguish behavior that can result in a loss of good-time credits. Respondent's Brief, at 8-9.

Respondent's position further supports the appropriateness for review of *Gotcher*. In *Sandin* this Court explicitly criticized and rejected the constitutionalization of internal prison proceedings based upon a myopic focus on single words contained in state regulations:

> By shifting the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation, the Court encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges.

Sandin, 115 S.Ct. at 2299. Despite *Sandin*, Respondent argues that this Court does not sit to "save the states" from their use of the word "serious" as a category of prison misbehavior in a state regulation. Respondent's Brief, at 9. This Court's review is warranted to save the states from a published Ninth Circuit decision under which routine prison disciplinary proceedings will be constitutionalized merely because a state regulation contains the word "serious".

Like the Ninth Circuit, Respondent makes no argument that a loss of thirty days good-time credits presents a hardship that is "atypical and significant . . . in relation to the ordinary incidents of prison life", or "a dramatic departure from the basic

conditions" of his criminal sentence. *Id.* at 2300, 2301. Respondent does not dispute that loss of good-time credits may be given in response to a "wide range of misconduct", under the Washington regulations. *Id.* Respondent ignores the concerns expressed by this Court in *Sandin* that federal courts refrain from "the day-to-day management of prisons", and that they not create "disincentives for States to codify prison management procedures in the interest of uniform treatment." *Id.* at 2299.

D. Petitioner's Request For Review of a Binding and Published Decision is Not "Premature".

Respondent argues that it is too early for this Court to review *Gotcher* because (1) the case was decided on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), and (2) the Washington prison disciplinary rules have recently been revised.

First, despite its procedural history, *Gotcher* is a published decision that has constitutionalized Washington disciplinary regulations as a matter of law whenever a loss of a good-time credit is at issue. App. A-11; *Gotcher*, 66 F.3d at 1100-01. Second, Respondent has not identified a single revision to the rules that would make a difference under the Ninth Circuit's conclusory analysis. The revised regulations still use the word "serious" to distinguish the two broad categories of infractions, and the Ninth Circuit has already held, without citation of authority, that Washington cannot expressly disclaim the creation of a liberty interest. App. A-11; 66 F.3d at 1100; *Cf. Jones/Seymour v. LeFebvre*, 781 F. Supp. 355, 359 (E.D. Pa. 1991); *Williams v. Kyler*, 680 F. Supp. 172 (M.D. Pa. 1986), *affirmed*, 845 F.2d 1019 (1988). Under these circumstances, review is not premature.

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E. Conclusion

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED

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